114-262

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 657.

THE BRADSTREET COMPANY

vs.

FORRESTER H. HIGGINS.

Brief in Reply to Motion to Dismiss Writ of Error, or to Affirm the Judgment under Rule 6.

HENRY WISE GARNETT,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS,

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 657.

THE BRADSTREET COMPANY

vs.

FORRESTER H. HIGGINS.

Brief in Reply to Motion to Dismiss Writ of Error, or to Affirm the Judgment under Rule 6.

Under sec. 3512 of the Missouri Practice act, the plaintiff may unite several causes of action in his petition, but the several causes must be separately stated, and, where there are distinct causes of action stated, a general verdict will not answer.

By sec. 3521 of the same act, the answer shall contain a denial of each material allegation of the petition, and second, a statement of any new matter constituting a defense or counter-claim.

By sec. 3522 it is provided that these defenses and counter-claims must each be separately stated.

To this answer, or these answers, the plaintiff can demur or reply; and by each demurrer or reply to each separate defense it is apparent that a new and separate issue is made, as much so as if the plaintiff had stated, in separate counts, separate causes of action, and the defendant had filed separate replies or answers thereto; and thus a single cause of action

stated by a plaintiff may, by separate counter-claims thereto, and separate replies to these counter-claims, develop a number of separate issues for the jury to separately determine.

When petition sets out several distinct causes of action, a verdict of an entire and gross amount cannot be sustained; there should be a separate assessment on each cause or count—in order that the court may know how the issues were found, and what amount was assessed on each count.

Brownell *vs.* The Pacific R. R., 47 Mo., 243.

Where several causes of action are united in the same petition, a verdict must be found, and damages assessed upon each cause of action separately, if the finding be for the plaintiff, or the judgment will be arrested.

Pitts *vs.* Fugate, Adm't'x, 41 Mo., 405.

It is error to render a general verdict when the petition includes several distinct causes of action.

Bigelow *vs.* The North. Mo. R. R. Co., 48 Mo., 500.

When more than one cause of action is being prosecuted, each cause should be stated separately, and with the relief sought, so as to make a complete petition of itself. It is held that the verdict must be responsive to each statement, and that a general verdict is erroneous.

Ranney *vs.* Bader, 48 Mo., 540.

A general verdict for a general sum of damages, where there are several counts or causes of action set forth in the petition, is improper, and if an objection is made thereto, by motion in arrest of the judgment, the judgment will be arrested.

Owen *vs.* Hann. & St. J. R. R., 58 Mo., 386.

The Supreme Court will reverse a judgment, when the

verdict is a general verdict, on a petition which states distinct causes of action, and the attention of the Court has been directed to the error.

Sturgeon *vs.* St. Louis, Kansas City & Northern R. R. Co., 65 Mo., 569.

It is clear that in this case below three issues were presented to the jury. First, was the plaintiff entitled to recover; and, if so, in what amount? Second, was the defendant below entitled to its counter-claim of $1,104.18? and, third, was the defendant below entitled to its counter-claim of $1,833.42? Both these counter-claims were set up in the pleadings.

The plaintiff below sued for and claimed $8,000, and the jury rendered a general verdict in his favor for $3,333.92, without making any finding or verdict on the second and third issues presented to them.

It needs no authority to sustain the proposition that the verdict must respond to all the issues, and to the whole of each issue; and as the verdict in this case fails to meet this requirement it is informal and irregular.

This is attempted to be cured by the plaintiff below by introducing an affidavit by three of the jurors stating that both of the counter-claims made by the defendant were considered in the jury-room. The reply to this is, that, while affidavits of jurors may be admitted to sustain verdicts, it has nowhere been held that an affidavit by three members of a jury can stretch the verdict into responding to two issues on which it is silent; and the affidavit cannot assist, or rather, as is attempted, make a verdict on these issues.

The defendant in error is not correct in his claim that the amount in controversy in this case is less than $5,000.

He states on pages 5 and 6 of his motion, "the amount of the plaintiff's demand is fixed by the judgment at $3,333.92; and as the amount of the counter-claims really shown to exist in favor of defendant, added to the judgment, fall short

of $5,000, the writ will not lie, and should be dismissed." In this statement there is error, for the amount of the counter-claims is $2,937.60, which, added to the verdict of $3,333.92, makes the sum of $6,371.52, which is the amount still in dispute between the parties to this cause, as, according to the record, the issues presented by the counter-claims are as yet unpassed upon, and the plaintiff in error is entitled to have them considered.

It is argued that there is no proper bill of exceptions here, because, it is claimed, the exceptions were not taken until after the trial; and in support thereof reference is made to a paper filed, stating that the defendant desires to be understood as excepting to the charge of the court in every particular thereof, in such manner and form as may be stated hereafter, etc. This applies only to the charge.

In reply, this Court will look at the statement made in the record in the bill of exceptions signed by judge, which positively informs this Court, on pp. 27, 29, 32 and 33 of the record, that the exceptions were taken at the times the rulings were made and the charge delivered. It is submitted that such statements, certified to by the judge who tried the case, cannot be set aside and held for naught because of a paper stating that the manner and form of the exceptions to the charge will be more fully stated subsequently at the leisure of the Court.

It also appeared from the record that exceptions were taken and noted at the times rulings were made during the trial.

HENRY WISE GARNETT,
Attorney for Plaintiff in Error.

114-162

SUPREME COURT OF THE UNITED STATES.

THE BRADSTREET CO.

vs.

T. H. HIGGINS.

No. ~~1015~~ 657

Motion to Dismiss Writ of Error, and Vacate Supersedeas.

KARNES & ESS,
CHAS. L. DOBSON,
Att'ys for Deft. in Error.

W. HALLETT PHILLIPS,
of Counsel.

R. O. POLKINHORN, PRINTER, WASHINGTON, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE BRADSTREET COMPANY, *Plaintiff in Error*,

AGAINST

FORRESTER H. HIGGINS, *Defendant in Error*.

No. 1048.

Error to the Circuit Court of the United States for the Western Division of the Western District of Missouri.

MOTION OF DEFENDANT IN ERROR TO DISMISS WRIT OF ERROR AND TO VACATE SUPERSEDEAS.

Now comes the above-named defendant in error, by his attorneys, and moves the court to make an order dismissing the writ of error issued in this cause to the Circuit Court of the United States for the Western Division of the Western District of Missouri, on the 16th day of December, 1882, and to vacate the supersedeas upon the following facts and upon the following grounds:

Statement of Facts.

On the 9th day of February, 1880, the defendant in error brought suit against the plaintiff in error in the Circuit

Court of Jackson County, Missouri, for the sum of *eight thousand dollars*, for and on account of the conversion by plaintiff in error of certain books, papers, files, memoranda, data, furniture, etc., belonging to the defendant in error, and such as are usually kept in an office of a commercial agency, together with the subscriptions and good will of the office, and business at Kansas City. (See record, pages 3, 4.) The plaintiff in error, being a foreign corporation, removed the cause to the Circuit Court of the United States for the Western Division of the Western District of Missouri, where the cause was tried.

The amended answer of plaintiff in error contains (1) a general denial of all the allegations in the petition, and some special matter of defense is also pleaded; (2) a counter-claim for the sum of $1,104.18, claimed to be due from defendant in error for and on account of moneys collected by him for, and while he was in the employ of plaintiff in error, in its office at Kansas City; and (3) a counter-claim for the sum of $1,833.42 for damages alleged to have been sustained by plaintiff in error on account of the breach of a contract (pleaded in said counter-claim) between the parties hereto, whereby the defendant in error agreed and guaranteed that the expenses of the Kansas City office, or commercial agency, belonging to plaintiff in error, and of which defendant in error had been employed as superintendent, should not exceed the receipts of the said office. (See record, pages 15, 17.)

To the first counter-claim defendant in error replied admitting that he had collected about the sum of $1,104.18 as charged, and admitting that plaintiff in error was entitled to a credit for the amount claimed upon what now might be found due defendant in error upon his petition. (See record, pages 17–18.) To the second counter-claim defendant in error replied, denying all the material allegations therein, and alleging further that if the expenses exceeded the re-

ceipts of the office in any sum, it was because of the unwarranted interference of the plaintiff in error in the business of the Kansas City office, against the will and without the consent of defendant in error. (See pages 18–19.) Thus there was no issue or dispute between the parties as to the first counter-claim of $1,104.18.

The trial of the cause resulted in a verdict and judgment in favor of the defendant in error for the sum of $3,333.92, and the form of the verdict of the jury was as follows:

> "We, the jury find for the plaintiff in the sum of three thousand three hundred and thirty-three dollars and ninety-two cents. ($3,333.92.)
>
> "WM. S. STARR, Foreman."

The plaintiff in error in due time filed its motion for a new trial, upon the ground, among other things, that there was no finding by the jury of the issues made by the second and third defenses set up in the answer. (See record, page 34.) Before the motion for new trial was taken up, the defendant in error, by leave of the court, filed the following affidavits:

STATE OF MISSOURI, }
JACKSON COUNTY. }

United States Circuit Court, Western Division, Western District Missouri, at Kansas City. }
May Term, 1882. }

FORRESTER H. HIGGINS, *Plaintiff*,
against
THE BRADSTREET COMPANY, *Defendant*.

The undersigned jurors who were upon the jury who tried the above entitled cause, to-wit: Lewis J. Williams, John Hobart and W. E. McBride, being first duly sworn, upon their oaths say that in arriving at their verdict in the above entitled cause, they first unanimously agreed upon the amount which they believed the plaintiff was entitled to recover under the evidence and instructions upon the cause of action set up in the petition, which was the sum of four thousand

five hundred dollars, and that from that sum they deducted the amount of defendant's first counter claim, to-wit, $1,104.-18; and also the amount they found due said defendant upon its second counter-claim, to-wit, $62.50, or about that sum, being the amount defendant's attorneys claimed in their arguments upon that counter-claim, and the result was the sum of $3,333.92 in plaintiff's favor, as shown by the verdict.

[Signed] LEWIS J. WILLIAMS,
JOHN HOBART,
W. E. MCBRIDE.

W. E. McBride, upon his oath, states that the matters and things in the foregoing affidavit are true to the best of his knowledge and belief.

Sworn and subscribed to before me this 29th day of May, 1882. CHAS. S. CRYSLER,
[L. S.] *Notary Public.*

John Hobart, upon his oath, states that the matters and things in the foregoing affidavit are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 29th day of May, 1882. FREDERICK L. PETRI,
[L. S.] *Notary Public.*

Lewis J. Williams, upon his oath, states that the matters and things in the foregoing affidavit are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 30th day of May, 1882. FREDERICK L. PETRI,
[L. S.] *Notary Public.*

(See record, page 36), which affidavits were read to the court upon the hearing of the motion for a new trial.

Upon the trial of the cause the testimony introduced by the plaintiff in error in support of the third defense, or counter-claim for $1,833.42, only tended to prove the plaintiff in error was entitled to recover on said counter-claim $61.10. The bill of exceptions recites: "Also evidence tending to show that the legitimate expenses of the Kansas City office exceeded its legitimate receipts during the time plaintiff acted as its superintendent, in the sum of $61.10, including plaintiff's salary of $100 per month as expenses. (See record, page 27.)

Upon the foregoing statement of facts, the defendant in error deduces and assigns the following

GROUNDS FOR THE MOTIONS.

[1] It is apparent upon the face of the record that there is less than five thousand dollars actually in dispute between the parties hereto, and that therefore this Court has no jurisdiction of this cause. [2] That the affidavits of the jurors filed by the defendant in error show that the two counter-claims of plaintiff in error were considered by the jury, and that all was allowed to plaintiff in error thereon that it claimed at the trial. [3.] That the first counter-claim of $1,104.18 was not in dispute between the parties, but was *admitted by the pleadings;* and all the evidence offered by plaintiff in error in support of its second counter-claim *only tended to establish a demand of $61.10*, and no more, which sum added to the first counter-claim of $1,104.18, and the verdict of the jury, $3,333.92, makes $4,499.20, the total sum actually in dispute, without regarding the affidavit of the jurors, or, [4] That, as the counter-claim of $1,104.18 is admitted by the reply of the plaintiff below, it was not in dispute in the court below, and is not here; therefore, the amount of the verdict, $3,333.92, plus the $61.10 proved upon the second counter-claim, making $3,395.02, is the true amount in dispute. Hence, this Court has no jurisdiction, because the amount in dispute between the parties, exclusive of costs, does not exceed the sum of five thousand dollars.

I.

It being apparent from the whole record that the amount actually in dispute between the parties, since the rendition of the verdict, is less than $5,000, this court has no jurisdiction of the case, the writ of error never should have been issued, and should now be dismissed, and the supersedeas granted should be vacated.

Gray vs. *Blanchard*, 97 U. S., 564;
Lamar vs. *Micow*, 104 U. S., 465;
Troy vs. *Evans*, 97 U. S., 1;
Schacker vs. *Hartford Fire Ins. Co.*, 93 U.S., 241;
Thompson vs. *Butler*, 95 U.S., 694;
3 Mors. Trans. 9, 34;
Seaver vs. *Biglows*, 5 Wall., 208.

II.

If the plaintiff below had sued out this writ, this court would have had jurisdiction, but as the writ was sued out by the defendant below, the amount of the plaintiff's demand is fixed by the judgment at $3,333.92, and as the amount of the counter-claims really shown to exist in favor of defendant, added to the judgment, falls short of $5,000, the writ will not lie, and should be dismissed.

Walker vs. *U. S.*, 4 Wall., 163;
3 Peters, 33, *Gordon* vs. *Ogden*.

III.

It is competent to use the affidavit of jurors to explain verdicts for the purpose of upholding them, and to show that the jury, in arriving at their verdict, obeyed the instructions of the court, and were guided by the evidence; although affidavits of jurors cannot be used to attack or nullify a verdict. It is clear from the affidavits of the jurors in this case that the jury considered and passed upon the merits of the counter-claims, as well as of the petition. In fact, the jury allowed defendant below all that was claimed for it at the trial, and all the evidence even tended to prove. But aside from this affidavit, it is most apparent that there is less than $5,000 in dispute. It is only claimed in the bill of exceptions that the evidence tended to establish a demand of $61.10 upon the second counter-claim, notwithstanding the fictitious claim of $1,838.42. Hence, the real sum in dispute

upon that counter-claim, $61.10, and not the feigned amount claimed in the answer. There is no error complained of in the court below in excluding any evidence or making any ruling that improperly brought about the reduction of the unfounded claim of $1,838.42 down to the real amount in dispute, $61.10. The purpose of the writ of error is to correct errors in matters of law, not to open up controversies and to let in new proof as to matters of fact, when no error in law is committed.

We respectfully submit, that upon the record and under the rulings of this court the writ of error should be dismissed and the supersedeas vacated.

KARNES & ESS,
CHAS. L. DOBSON,
Attorneys for Defendant in Error.

W. HALLETT PHILLIPS,
of Counsel.

114-262

RECEIVED
OCT 15 1884
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

No. 657.

THE BRADSTREET COMPANY

vs.

FORRESTER H. HIGGINS.

MOTION TO DISMISS WRIT OF ERROR, OR TO AFFIRM THE JUDGMENT UNDER RULE 6.

KARNES & ESS,
CHAS. L. DOBSON,
Att'ys for Defendant in Error.

W. HALLETT PHILLIPS,
of Counsel.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS.
1884.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE BRADSTREET COMPANY,

AGAINST

FORRESTER H. HIGGINS.

No. 657.

Motion to dismiss writ of error, or to affirm the judgment under Rule 6.

The defendant in error, by his attorneys, moves the court to make an order dismissing the writ of error issued in this cause to the Circuit Court of the United States for the Western Division of the Western District of Missouri, on the 16th day of December, 1882, or to affirm the judgment upon the grounds stated in accompanying brief.

Take notice that these motions will be submitted three weeks from service of brief.

To Counsel for Plaintiff in Error.

W. HALLETT PHILLIPS,
for Defendant in Error.

Statement of Facts.

On the 9th February, 1880, the defendant in error brought suit against the plaintiff in error in the Circuit Court of Jackson County, Missouri, for the sum of eight thousand dollars, on account of the conversion by plaintiff in error of certain books, papers, files, memoranda, data, etc., belonging to the defendant in error, and such as are usually kept in an office of a commercial agency, together with the subscriptions and good will of the office, and business at Kansas City. Record 3-4.

The plaintiff in error, a foreign corporation, removed the cause to the Circuit Court of the United States.

The amended answer contains (1) a general denial of all the allegations in the petition, and some special matter of defense; (2) a counter-claim for the sum of $1,104.18, claimed to be due from defendant in error for and on account of moneys collected by him for, and while he was in the employ of plaintiff in error, and (3) a counter-claim for the sum of $1,833.42 for damages alleged to have been sustained by plaintiff in error on account of the breach of a contract (pleaded in said counter-claim) between the parties thereto, whereby the defendant in error agreed and guaranteed that the expenses of the Kansas City office, or commercial agency, belonging to plaintiff in error, and of which defendant in error had been employed as superintendent, should not exceed the receipts of the said office Record 15-17.

To the first counter-claim defendant in error re-

plied admittting that he had collected the sum of $1,104.18 as charged, and admitting that plaintiff in error was entitled to a credit for the amount claimed upon what now might be found due defendant in error upon his petition. Record 17–18.

To the second counter-claim defendant in error replied, denying all the material allegations therein, and alleging further that if the expenses exceeded the receipts of the office in any sum, it was be cause of the unwarranted interference of the plaintiff in error in the business of the Kansas City office, against the will and without the consent of defendant in error. Record 18–19.

Thus there was no issue or dispute between the parties as to the first counter-claim of $1,104.18.

The trial of the cause resulted in a verdict and judgment in favor of the defendant in error for the sum of $3,333.92.

The plaintiff in error in due time filed its motion for a new trial, upon the ground, among other things, that there was no finding by the jury of the issues made by the second and third defense set up in the answer. Record 34. Before the motion for new trial was taken up, the defendant in error, by leave of the court, filed the following affidavits, duly sworn to:

FORRESTER H. HIGGINS, *Plaintiff,*
against
THE BRADSTREET COMPANY, *Defendant.*

The undersigned jurors who were upon the jury who tried the above entitled cause, to wit: Lewis J.

Williams, John Hobart and W. E. McBride, being first duly sworn, upon their oaths say that in arriving at their verdict in the above entitled cause, they first unanimously agreed upon the amount which they believed the plaintiff was entitled to recover under the evidence and instructions upon the cause of action set up in the petition, which was the sum of four thousand five hundred dollars, and that from that sum they deducted the amount of defendant's first counter claim, to wit, $1,104.18; and also the amount they found due said defendant upon its second counter-claim, to wit, $62.50, or about that sum, being the amount defendant's attorneys claimed in their arguments upon that counter claim, and the result was the sum of $3,333.92 in plaintiff's favor, as shown by the verdict.

(Signed) LEWIS J. WILLIAMS,
JOHN HOBART,
W. E. MCBRIDE.

Upon the trial the testimony introduced by the plaintiff in error in support of the third defense, or counter-claim for $1,833.42, only tended to prove the plaintiff in error was entitled to recover on said counter-claim $61.10. The bill of exceptions recites:

> "Also evidence tending to show that the legitimate expenses of the Kansas City office exceeded its legitimate receipts during the time plaintiff acted as its superintendent, in the sum of $61.10, including plaintiff's salary of $100 per month as expenses." R. 27.

Grounds for the Motions.

The first counter-claim of $1,104.18 was not in dispute between the parties, but was *admitted by the pleadings;* and all the evidence offered by plaintiff in

error in support of its second counter-claim *only tended to establish a demand of* $61.10. This sum, added to the first counter-claim of $1,104.18, and the verdict of the jury, $3,333.92, makes $4,499.20, without regarding the affidavit of the jurors.

But as the counter-claim of $1,104.18 is admitted by the reply of the plaintiff below, it was not in dispute in the court below, and is not here; therefore, the amount of the verdict, $3,333.92, plus the $61.10 proved upon the second counter-claim, making $3,395.02, is the true amount in dispute.

The affidavits of the jurors filed by the defendant in error show that the two counter-claims of plaintiff in error were considered by the jury, and that all was allowed to plaintiff in error thereon that it claimed at the trial.

It being apparent from the whole record that the amount actually in dispute between the parties since the rendition of the verdict is less than $5,000, this court has no jurisdiction of the case, and the writ of error should now be dismissed.

Gray vs. *Blanchard*, 97 U. S., 564;
Hilton vs. *Dickerson*, 108 U. S., 165.

If the plaintiff below had sued out this writ, this court would have had jurisdiction, but as the writ was sued out by the defendant below, the amount of the plaintiff's demand is fixed by the judgment at $3,-

333.92; and as the amount of the counter-claims really shown to exist in favor of defendant, added to the judgment, falls short of $5,000, the writ will not lie, and should be dismissed. The first counter-claim being admitted to be due, is no longer in controversy.

> *Jenness* vs. *Citizens' Bank*, 110 U. S., 52;
> *Wabash R. R.* vs. *Knox*, 110 U. S., 304;
> *Tintsman* vs. *National Bank*, 100 U. S., 6.

If the second counter-claim of $1,833.42 could be considered, it would only have the effect of reducing the amount of the recovery, without entitling the defendant to a judgment in his own favor. In such a case jurisdiction does not exist.

> *Lamar* vs. *Micou*, 104 U. S., 465;

But the real amount of the second counter-claim was, as shown above, only $61.10, although the sum demanded was $1,833.42.

> "It is undoubtedly true that *until it is in some way shown by the record* that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail."

Again:

> "We have jurisdiction of a writ of error or appeal by a defendant when the recovery against

> him was as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counter-claim *for enough to give us jurisdiction*, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed. It is the actual matter in dispute as shown by the record, and not the *ad damnum* alone, which must be looked to."
>
> *Hilton* vs. *Dickerson*, 108 U. S., 175.

In the present case the amount demanded by the second counter-claim is not sufficient to give this court jurisdiction. If it had been allowed, it would only have gone in the reduction of the amount of the judgment, which judgment does not amount to the jurisdictional sum.

As we have seen, the record clearly shows that the real amount involved in the second counter-claim was only $61.10. It is so stated by the defendant himself in his bill of exceptions.

There is no error complained of in the court below in excluding any evidence or making any ruling that improperly brought abou· the reduction of the unfounded claim of $1,838.42 down to the real amount in dispute, $61.10.

In the face of these facts, we think it is clear that the court is without jurisdiction.

It is competent to use the affidavit of jurors to explain verdicts for the purpose of upholding them, and

to show that the jury, in arriving at their verdict, obeyed the instructions of the court, and were guided by the evidence; although affidavits of jurors cannot be used to attack or nullify a verdict. It is clear from the affidavits of the jurors in this case that the jury considered and passed upon the merits of the counter-claims, as well as of the petition. But aside from the affidavits, it is most apparent that there is less than $5,000 in dispute.

But if the court should be of opinion that they possess jurisdiction of the cause, the judgment should be affirmed, inasmuch as none of the errors complained of, can be considered by the court, for want of a proper bill of exceptions.

The record shows that the exceptions were not taken until after the trial.

On the 19th of May, 1882, the verdict of the jury was rendered and recorded.

The record recites:

> "And on the same day, to wit, the 19th day of May, 1882, the following paper was filed with the clerk of said court, to wit:
>
> "The defendant would like to be understood as excepting to the charge of the court in every particular thereof, in such manner and form as may be stated hereafter, at a time when the business of the court will not be interrupted, and also to the refusal of the court to charge as requested by the defendant."
>
> R., 20.

We submit that this paper shows that no exceptions were taken during the trial and before the jury retired from the bar.

It is true that the bill of exceptions which was allowed and filed December 16, 1882, contains a prayer, which the defendant asked the court to give to the jury, and recites:

> "The court refused so to instruct the jury, to which ruling and decision of the court defendant at the time excepted."
>
> p. 29.

The bill of exceptions also sets out in full the charge which the court gave, and recites "that the defendant at the time objected" to certain portions.

p. 32.

These allegations are overcome by the paper filed by the defendant on the day of the trial.

A party cannot except to the rulings of a judge by filing a paper with the clerk reserving general objections.

The reason for requiring objections to the charge of the judge being made at the time it is delivered and before the jury retires from the bar, is to give the judge an opportunity to correct any errors he finds he may have made, by reconsidering his opinion or explaining it more fully to the jury.

Phelps vs. *Mayer*, 15 How., 161;
U. S. vs. *Carey*, 110 U. S., 51.

It is evident that the defendant in this case specified

his objection for the first time when he formerly drew out his bill of exceptions after the adjournment of the court.

The bill of exceptions contained in the record violates all the rules laid down by this court governing the subject.

The whole of the evidence in the case is inserted, as well as the whole of the charge, and all of the proceedings on motion for a new trial.

We submit that if the writ of error is not dismissed, the judgment should be affirmed.

KARNES & ESS,
CHAS. L. DOBSON,
Att'ys for Defendant in Error.

W. HALLETT PHILLIPS,
of Counsel.

In the Supreme Court of the United States.

THE BRADSTREET Co.
vs.
F. H. HIGGINS.
No. 657.

TAXATION OF COSTS.

The attention of the Court is called to the question of taxation of costs in the above case.

The plaintiff in error failing to print the record, the requisite amount was advanced by the defendant in error, with the understanding that in case of his success this would be refunded.

The Clerk now informs the defendant in error, that the amount advanced by him cannot be taxed in his favor, nor any of his other costs in this Court, because the cause was dismissed for want of jurisdiction. As the taxation of costs in such cases is a matter of daily occurrence, and frequently of much importance, we take this occasion of bringing the subject to the attention of the Court.

Unquestionably, the general rule in England was, that courts could not give judgment where there was no jurisdiction.

This rule embraced judgments for costs as well as other judgments. But in England the whole subject of costs is regulated by statute. At common law costs were not recoverable; courts did not allow them when not given by some statute. None were given, for instance, when a writ of error was quashed for defects, until the statute of 4 and 5 Anne, Ch. 16; Com. Dig. 230 B.

There is no statute expressly conferring power upon this Court to award costs.

Therefore, in 1831, Mr. Justice BALDWIN, on the adoption of what was then R. 37, delivered an elaborate dissenting opinion. That rule provided that in cases of dismission (except for want of jurisdiction,) or affirmance, one copy of the record shall be taxed against the plaintiff. In cases of reversal, and dismission for want of jurisdiction, each party shall be charged one-half the legal fees for a copy.

6 Pet., 724.

The court has grounded its exercise of the power on the repeated recognition by acts of Congress of the right of the prevailing party to costs, and the exercise of the power since the first organization of the court.

State of Penn. vs. *Wheeling Bridge Co.*, 18 How., 461.

By the act of 1842, 5 Stat., 518, the court is given power to prescribe regulations as to the payment and taxation of costs in the circuit and district courts.

As to costs incurred upon writ of error or appeal, Congress has left the question to be wholly regulated by the Court itself.

The practice as to costs in cases of the dismissal of the writ of error for want of jurisdiction, has varied.

In *Winchester* vs. *Jackson*, (1806), 3 Cr., 514, the *writ of error was dismissed*. Notwithstanding the statement of the clerk that the practice had been to dismiss without costs, when the dismissal was for want of jurisdiction, the court directed the case to be dismissed *with costs*. This was done advisedly, for we find the court enforcing an attachment for the costs in 1812.

Caldwell vs. *Jackson*, 7 Cr., 276.

In *Montalet* vs. *Murray*, (1807), where the *judgment was reversed* for want of jurisdiction in the court below, costs were allowed on the authority of *Winchester* vs. *Jackson*. 4 Cr., 47.

In this case it is mentioned that at the end of the term, the rule was adopted that where the *judgment is reversed* for want of jurisdiction, it must be without costs.

That rule is now incorporated in rule 24.

It is subject to exceptions, as where the defendant in the court below is the defendant in this Court.

Turner vs. *Enrille*, 4 *Dall.*, 7;
Hornthall vs. *Coll*, 9 Wall., 566;
M. C. & L. M. R. R. vs. *Swan*, 111 U. S., 387.

In 1838, by R. 45, (now 24), it was provided, that in all cases where any suit shall be dismissed in this Court, *except where the dismissal shall be for want of jurisdiction*, costs shall be allowed to the defendants in error.

Notwithstanding, as we have seen, by old R. 37, the costs for copy of transcript were partly taxed against the losing party even in case of dismissal for want of jurisdiction.

That rule was afterwards known as R. 10, sub. 6, and was amended, as follows: "In all cases of dismissal for want of jurisdiction, the fees for the copy shall be taxed against the party bringing the case into court, unless the Court shall otherwise direct.

Phillips' Pr., 492, Ed. 1878.

In the revision of the rules promulgated *Jan'y* 7, 1884, this sub-division of the rule is omitted.

The reason for such omission was that by present R. 10, Sub. 4, the original transcript is directed to be sent to the printer, and the charge of the Clerk is now for preparing it for the printer and supervising the printing.

It is only just that such fees should be taxed against the party who brings the case into court. Under the rules it is the duty of the plaintiff in error or appellant to print the record, and he is required, on docketing a case and filing the record, to satisfy the Clerk as to the payment of cost of same.

When the case is dismissed for want of jurisdiction, the Clerk is certainly allowed to collect *his* fees from the losing party, and if so, why should he not pay over to the defendant any surplus in his hands, to reimburse such defendant for costs which should properly have been paid by the plaintiff in error or appellant? Or, if no surplus remains, why should not such costs be taxed against the party bringing the cause into court?

Even if the court will not render a judgment for costs generally in cases of dismissal for want of jurisdiction, it should exercise the power which it possesses over the parties, in the matter of paying for the printing of the record, and the Clerk's fees for preparing the record and supervising the printing.

It is well known that immense records are constantly brought to this Court without the cases containing a shadow of jurisdiction, and in order to have the same dismissed, the defendant in error has to print the record, as the plaintiff in error invariably refuses to do so. In case of the success of the motion, the claim is that the defendant in error cannot be reimbursed, although, by the rules, the plaintiff in error